SUPREME COURT, U. S.
FILED
OCT 31 1968

In the Supreme Court of the United States

OCTOBER TERM, 1968

STUYVESANT INSURANCE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

FRED M. VINSON, JR.,
Assistant Attorney General,

[illegible] ROSENBERG,
[illegible] G. MAYBACK,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 252

STUYVESANT INSURANCE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The United States District Court for the Southern District of New York denied petitioner's motion to declare null and void and to set aside the forfeiture of two bail bonds written by petitioner in a criminal case (Pet. App. 1a-4a). On April 24, 1968 the court of appeals affirmed (Pet. App. Supp. 5a-14a). A petition for rehearing en banc was denied on May 29, 1968 (C.A.R. 225-232).[1] Since the motion involved

[1] "C.A.R." refers to the record in the court of appeals.

arose in and was disposed of as an integral part of a criminal proceeding (see Rule 46(f), F. R. Crim. P.), it would appear that the time within which to file a petition for certiorari is that applicable to criminal cases. In that event, the instant petition, filed on July 1, 1968, is out of time under Rule 22-2 of the Rules of this Court. In any event, the issues raised do not warrant further review.

1. Egan and Hill, Australian nationals, were arrested in Miami, Florida, and removed to New York (R.I, 86-95).[2] On January 25, 1967, they were indicted in the Southern District of New York for conspiracy with others to deal in unlawfully imported narcotics in violation of 21 U.S.C. 173 and 174 (R.I, 82-82a). Both defendants, then represented by attorney Stone, pleaded not guilty. Their bail was fixed at $20,000 (R.I, docket sheet A, 97, 98). On February 20, 1967, Hill's bond was reduced to $15,000 and was furnished the following day by petitioner as surety (R.I, 96, 104-106). The bail bond provided that Hill should appear in the district court "and at such other places as the defendant may be required to appear, in accordance with any and all orders and directions relating to the defendant's appearance in the above entitled matter as may be given or issued by the commissioner or by the United States District Court" (R.I, 106). The bond also contained restrictions that the defendant should surrender all passports, that he should stay away from transportation centers, that he

[2] "R.I" refers to the record in 67 Cr. 72, and "R.II" to the record in 67 Cr. 196; both records are on file with the Clerk of this Court.

should report to the marshal at 10:30 each morning, and that he should be limited to the Borough of Manhattan (R.I, 106). On March 3, 1967 Egan's bond was reduced to $12,500, and was posted on March 7, again with petitioner as surety (R.I, 100, 108-110). Egan's bond included the same conditions of release as Hill's bond (R.I, 108-110).

On March 17, 1967, a superseding indictment—67 Cr. 196—was filed charging Egan and Hill with the offense previously charged in 67 Cr. 72, but adding ten other defendants (R.II, 79-81). On March 21, 1967, Egan and Hill were arrested by Immigration Service authorities and remained in jail until each was released on a $5,000 bond furnished by petitioner, Egan on March 28, and Hill on April 4 (C.A.R. 213; R.II, 16, 50). On March 23, while they were still in custody, the marshal presented them before Judge Bonsal and they pleaded not guilty to the superseding indictment (R.II, 1, 12). At this March 23 hearing, Hill was represented by Mr. Stone. Since Egan said he then had no attorney, Mr. Stone consented to represent Egan as well so far as this proceeding was concerned (R.II, 7-10). The court ordered bail on the new indictment to be set in the same amount as previously fixed on the earlier indictment, which was marked "off the calendar." The court further ordered that the original bail bonds be written to cover both indictments (R.II, docket sheet B, 3, 24). The following colloquy then occurred (R.II, 29):

> MR. TENDY (government attorney): The bail as to Hill and Egan on the prior indictment, it is agreeable to the government, can be set to cover

both indictments. This will necessitate, I believe, a rewriting of the bail, but this is Mr. Stone's problem.

MR. STONE (defense attorney): I've got too many problems, your Honor.

THE COURT: That is agreeable to you, I take it, Mr. Stone?

MR. STONE: Yes, your Honor.

THE COURT: All right.

However, Egan and Hill, and their attorney, Mr. Stone, never took any steps to have the bonds rewritten.

On April 5, 1967, different counsel filed a notice of appearance for Egan, and Mr. Stone continued to represent Hill (R.II, docket sheet B). On May 22, Judge Cannella granted defendants' motions to have the order, which required them to report to the marshal every day, modified so that instead they could report every ten days (R.II, 191, 197-199). On June 19, Judge Mansfield granted Hill's motion for leave to extend the bail limits to include Mr. Stone's Long Island residence (R.II, 144-148, 210). While the agent of the surety declined to consent to this enlargement of the limits, there is no claim that Hill took advantage of it. The defendants reported to the marshal for the last time on July 10, 1967 (C.A.R. 214). On July 14, when their trial on 67 Cr. 196 was to be held, they failed to appear and bench warrants were issued. On July 20, Judge Bonsal ordered bail forfeited on indictment 67 Cr. 196 (R.II, docket sheet D).

On July 28, 1967, the government moved for forfeiture of bail on indictment 67 Cr. 72 since the bail bond on indictment 67 Cr. 72, it was discovered, had

not been rewritten to cover indictment 67 Cr. 196. After a hearing at which Mr. Stone represented petitioner, Judge Cooper ordered the forfeiture (R.II, 71-78).

2. On August 3, 1967, Mr. Stone, representing petitioner, filed an application for an order to show cause why the bail bonds should not be declared null and void and the government enjoined from obtaining judgment on the basis of forfeiture of the bonds (R.I, 112-121). In a letter dated August 17, 1967, from Mr. Stone to Judge Cooper, Mr. Stone enclosed his memorandum of law stating petitioner's position as to the bond forfeitures, the docket sheets of 67 Cr. 72 and 67 Cr. 196, and the minutes of the proceedings of March 23 and July 28, 1967 (R.I, 141-154). In the letter Mr. Stone stated: "If you desire an evidentiary hearing, I would appreciate it if you advised my office of the time and place so I could subpoena the necessary witnesses" (R.I, 141). Without a hearing Judge Cooper, on November 6, 1967, rendered his opinion denying petitioner's motion to have the forfeiture of the bail bonds declared null and void (Pet. App. 1a-4a).

There was no reason to conduct a hearing at that time. There was no dispute as to the fact of default when bail was ordered forfeited on July 20, 1967.[3] Nor is there any dispute as to the basic facts on which petitioner's claim of non-liability depends—the super-

[3] Judge Cooper's inadvertent statement that the "defendants absconded since June 19, 1967" (Pet. App. 1a), although they did not do so until after July 10, 1967, is thus of no significance.

seding indictment, the failure to rewrite the bonds, and the enlargement of time for reporting.[4] The legal conclusions from those facts did not depend on any testimony which petitioner might produce.

3. No automatic exoneration of the surety resulted when the court agreed to the government's request to have the original indictment marked off the calendar. There was neither "a deposit of cash in the amount of the bond[s] or * * * a timely surrender of the defendant[s] into custody" so as to result in exoneration of the petitioner as surety under Rule 46(g), F.R. Crim. P.[5] The former indictment remained in effect. While the expectation was that Egan and Hill would be tried with the additional defendants added by the superseding indictment, it would have been proper to try them on the earlier indictment. The

---

[4] The statement by the court below that "Attorney Stone spoke in Court on behalf of Stuyvesant on March 3, 1967, at a hearing before Judge Weinfield" (C.A.R. 218) is not inaccurate. At that hearing Mr. Stone, although he was representing Hill and Egan and did not expressly state that he was appearing for petitioner, did speak on petitioner's behalf after telling the court how he succeeded in getting Hill out on bail after Hill and Egan had executed an assignment of $12,000 to their Florida attorneys. Mr. Stone stated (R.I, 64-65): "We are still arguing that problem with the attorneys. However, the surety [petitioner] has informed me that even if he had $12,000 collateral, he felt that that would be collateral for Hill for the $15,000 bond, which he hasn't gotten yet, and he certainly wouldn't want to take Egan out on the $15,000 bond, even though he feels Egan is an awfully nice fellow and has been reliable."

[5] Nor, under Rule 46(f), F.R. Crim. P., was there here an abuse of the discretion vested in the district court with regard to forfeitures of bail bonds (see Pet. App. Supp. 12a).

understanding on March 23, 1967, was that the existing bond would be rewritten to cover both indictments. Petitioner's subsequent actions, including its opposition to the enlargement of Hill's bail limits, showed that it considered the bonds in continuing effect even though they had not been rewritten.

4. Nor was petitioner exonerated as surety by reason of Judge Cannella's order of May 22, 1967, modifying the original order in the bonds that the defendants should report to the marshal every day, so as to require that they should report only every ten days. This modification came within the provision of the bonds that the defendants should appear at "such * * * places as * * * [they] may be required to appear, in accordance with * * * all orders * * * by the United States District Court" (R.I, 106, 110). This provision contemplated modifications in the orders of the court (see Pet. App. Supp. 11a). The change in reporting dates was thus not such a change of condition as to release petitioner from its obligation, particularly in the absence of any requirement in the bonds for notice to the surety of any such modifications.

Moreover, the record supports an inference that petitioner in fact knew of the change of condition. Even though petitioner did not execute a written consent to the modification, it was estopped from complaining of the new reporting arrangement since it knowingly acquiesced in it (see Pet. App. Supp. 12a). Almost a month after Judge Cannella's order, petitioner showed that it considered the bonds effective when it refused to consent to Mr. Stone's application

of June 19, 1967, for enlargement of the bail limits to allow Hill to work in Mr. Stone's garden in Long Island (R.I, 117). This was inconsistent with a claim that Judge Cannella's order had exonerated petitioner as surety. If petitioner had actually deemed that, by reason of the modification, it should be released, it had ample time to move for exoneration of its bonds.

5. Finally, the arrest and incarceration of the defendants by the Immigration Service did not constitute government harassment, which might operate to discharge the surety's obligation as a matter of law. Petitioner's obligation was not affected by this incarceration, since after the defendants' release from jail they reported to the marshal many times before they finally disappeared (see Pet. App. Supp. 9a-10a). Petitioner had ample time to surrender them, between their release from jail and the time when they absconded. *United States* v. *Carolina Casualty Insurance Co.*, 237 F.2d 451 (C.A. 7).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

JULY 1968

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 314543 55